IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 21, 2008

STATE OF TENNESSEE v. MATTHEW WAGGONER

Appeal from the Criminal Court for Davidson County
No. 2006-C-1904 & 2006-I-1112 Steve R. Dozier, Judge

No. M2007-01663-CCA-R3-CD - Filed October 21, 2008

Appellant, Matthew Waggoner, pled guilty in the Davidson County Criminal Court to two counts of aggravated burglary and two counts of burglary. Pursuant to his plea agreement, the trial court sentenced Appellant as a Range II Multiple Offender to an effective sentence of eleven years. The trial court held a sentencing hearing specifically for the purpose of addressing Appellant's request for alternative sentencing. The trial court denied Appellant's request and ordered Appellant to serve the sentence in incarceration. On appeal, Appellant argues that the trial court erred in denying an alternative sentence. After a thorough review of the record, we conclude that Appellant's lengthy criminal history and previous inability to meet conditions of probation and parole make him an unfavorable candidate for an alternative sentence. Therefore, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Michael A. Colavecchio, Nashville, Tennessee, for appellant, Matthew Waggoner.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Amy H. Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

RELEVANT BACKGROUND

On July 25, 2006, the Davidson County Grand Jury indicted Appellant for two counts of aggravated burglary and one count of theft in case number 2006-C-1894. On September 28, 2006, Appellant was charged with one count of attempted aggravated burglary and two counts of burglary by criminal information 2006-I-1112. On April 9, 2007, Appellant pled guilty to two counts of burglary in case number 2006-C-1894 and two counts of aggravated burglary in case number 2206-I-1112. Pursuant to the plea agreement, Appellant was sentenced as a Range II Multiple Offender to six years for each aggravated burglary count to run concurrently with each other and five years for each burglary count to run concurrently with each other and consecutively to the six-year sentences for the aggravated burglary convictions.

On May 11, 2007 and June 20, 2007, the trial court held a bifurcated sentencing hearing solely for the purpose of determining the conditions in which Appellant would serve his sentence. On June 28, 2007, the trial court filed a written order in which the trial court stated the following:

> At the hearing the Court heard testimony from Heather Poindexter, from the dual diagnoses department in community corrections. Ms. Poindexter testified that defendant has been interviewed by a doctor and has been diagnosed with panic disorder, stemming from a fear of public places, and additionally suffers from polysubstance abuse. She further testified that the defendant could stay in the Shipley House [FN 1] for six months. [FN 1 Shipley House is a halfway house where defendant would receive counseling for his drug problem and metal [sic] diagnosis.] The Court also heard testimony from the defendant at the sentencing hearing.
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> In making its sentencing determination this Court has considered (1) the evidence received at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) the potential for rehabilitation or treatment. *See* Tenn. Code Ann. § 40-35-210(a), (b) (2006); Tenn. Code Ann. § 40-25-103 (2006); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The issue before the Court is whether the agreed-upon sentence is one to serve in the custody of the Tennessee Department of Correction or the defendant is a proper candidate of alternative sentencing.
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> After reviewing the pre-sentence report the Court finds the defendant has a history of criminal activity. [FN 2 The defendant has six (6) prior felony convictions,

six (6) prior misdemeanor convictions (non-traffic offenses, one of which was a weapons charge), two (2) probation violations and one (1) parole revocation.] The Court places great weight on these facts and based on the numerous prior attempts at alternative sentencing the Court does not think that a half-way house will sufficiently protect the public from the defendant. The Court does not view defendant as being a proper candidate for alternative sentencing. Therefore, in consideration of the aforementioned factors the Court imposes the sentence agreed upon when defendant entered a guilty plea. The defendant is to serve two (2) five (5) year sentences, to run concurrently, to be served at thirty-five (35) percent for release eligibility purposes in indictment 2006-I-1112, and two (2) six (6) year sentences to run concurrently to be served at thirty-five (35) percent, in indictment 2006-C-1894, to run consecutive to the imposed sentence in indictment 2006-I-1112.

Appellant filed a timely notice of appeal.

ANALYSIS

On appeal, Appellant argues that the trial court erred in denying his request for an alternative sentence. "When reviewing sentencing issues . . . the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6); *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Furthermore, with regard to probation, a defendant whose sentence is ten years or less is eligible for probation. T.C.A. § 40-35-303(a).

However, all offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein pled guilty to two counts of aggravated burglary, a Class C felony, and two counts of burglary, a Class D felony, and was sentenced to less than ten years. Therefore, he is eligible for alternative sentencing including probation. *See* T.C.A. §§ 40-35-102(6) & -303(a). However, because Appellant was sentenced as a Range II Multiple Offender, he does not qualify for favorable consideration with regard to determination of the imposition of an alternative sentence. *See* T.C.A. § 40-35-102(6); *Carter*, 254 S.W.3d at 347. In addition, we point out that the above considerations are advisory only. *See* T.C.A. § 40-35-102(6).

We have reviewed the record on appeal and find that the trial court considered the sentencing principles and all pertinent facts in the case. Therefore, there is a presumption of correctness in the findings of the trial court. The trial court stated that it considered both Tennessee Code Annotated sections 40-35-102 and 40-35-103. The bases upon which the trial court denied alternative sentencing were primarily the fact that Appellant has a prior history of criminal activity and that a half-way house would not sufficiently protect the public from Appellant and the fact that previous attempts at alternative sentencing had failed with regard to Appellant.

With regard to Appellant's prior record, the pre-sentencing report shows a lengthy criminal history. Appellant's criminal history begins with a conviction in 1993, when he was nineteen years old. Appellant clearly has a history of various kinds of theft as evidenced by one conviction for theft under $500, three convictions for theft between $1,000 and $10,000, one conviction for theft between $10,000 and $60,000, and two convictions for burglary of an automobile. In addition, Appellant has prior convictions for aggravated assault, evading arrest, a weapons offense, possession of marijuana, possession of anhydrous ammonia, possession of unlawful drug paraphernalia, contributing to the delinquency of a minor, and two convictions of driving with a suspended license and one for the drivers' license law. From the time Appellant turned nineteen, he has had at least one conviction almost every year except for the years he has been incarcerated.

In addition to this lengthy criminal history, Appellant has previously failed to meet conditions required of an alternative sentence. On three occasions, Appellant has had a probation violation. On September 14, 1995, Appellant violated the conditions of his probation which was subsequently revoked. On October 20, 2001, Appellant violated the conditions of probation and was ordered to serve sixty days and was reinstated on intensive probation. On January 29, 2004, Appellant again violated probation. He was ordered to serve two hundred days and then probation was terminated. Appellant also has a parole violation with a subsequent revocation of parole.

We acknowledge that Appellant does not appear to be a violent criminal. However, he does have a lengthy criminal history which demonstrates a disrespect for the property of others, as well as a disrespect for the laws of the State of Tennessee. Appellant has been given three chances on probation, and he was unable to meet the conditions of those alternative sentences. Appellant was also released into the community on parole and could not meet the conditions of that alternative sentence. We agree with the trial court's assessment that a half-way house would not be sufficient protection for the public. Therefore, we conclude that the trial court's denial of alternative sentencing is supported by the record.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court.

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JERRY L. SMITH, JUDGE